In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 504

JOSEPH F. SCHIPANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of five counts of wilfully attempting to defeat and evade taxes for the years 1956 through 1960, in violation of 26 U.S.C. 7201 (Pet. A-14 to A-16).[1] He was sentenced to three years' im-

[1] "Pet. A-" refers to the separate appendix to the petition. "G.B." refers to the government's trial brief, which petitioner accepts as a convenient catalogue of proofs (Pet. 5-6) and which is filed with the Clerk.

prisonment and fined $2,500 on each count, the prison terms to be served concurrently (Pet. A-2). The court of appeals affirmed (Pet. A-1 to A-13, A-108; 362 F. 2d 825).

1. Petitioner filed no tax returns for the years 1943-1960, inclusive (Pet. A-2, A-32). He kept no books (Pet. A-2), was uncooperative in the investigation,[2] furnished no leads or explanations and adduced no proof at trial (Pet. A-2, A-6, A-30). The government's proof was based on the net-worth method; the sufficiency of that proof to support the trial court's findings is the primary issue presented by the petition.

a. The trial court, in an exhaustive opinion (Pet. A-14 to A-107), concluded that, during the five prosecution years, petitioner's total gross income was $77,815.95 (Pet. A-19) and his total tax liability was $15,667.34 (Pet. A-21).[3] Petitioner does not contest the evidence of net-worth increases and non-deductible expenses during the prosecution years (Pet. 5-6, A-9); rather he confines his challenge to the "opening net worth" figure for January 1, 1956—*i.e.*, $37,-

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[2] Petitioner told a revenue agent that he chose to take "a calculated risk" rather than respond to an invitation to visit the Internal Revenue Service office (G.B. 80).

[3] The year-by-year figures were as follows (Pet. A-19, A-21):

Year	Gross Income	Tax Due
1956	$15,798.92	$3,117.49
1957	13,055.47	2,121.39
1958	15,325.64	2,610.52
1959	20,722.93	5,575.85
1960	12,912.99	2,242.09

806.52 (Pet. A-5). In particular, he attacks the court's finding that he had zero or "trifling" cash on hand at the beginning of the prosecution period (Pet. A-8, A-17) and asserts instead that the nearly $78,000 attributed to gross income during that period represented petitioner's cash hoard as of the beginning of the prosecution years. The court below correctly held, however, that "there was ample evidence to support the findings and sufficient proof to establish [petitioner's] guilt on all of the counts beyond a reasonable doubt" (Pet. A-9).

As the court of appeals pointed out, "the Government made an exhaustive investigation into virtually every possible source of information concerning [petitioner's] economic circumstances from January, 1943 through December, 1960" (Pet. A-3). The government contacted over a hundred banks and numerous stores, brokers, finance companies, federal and State agencies and credit bureaus; it also made inquiries of petitioner's friends and relatives (Pet. A-3, A-29 to A-30). In arriving at the opening cash-on-hand figure, the following data, *inter alia*, were considered. In 1943, petitioner stated to prison authorities that he had left $1,350 in cash with his wife prior to his commitment that year (Pet. A-23). Between 1943 and 1956, his total expenditures were $47,932.27, including rent but not including other living expenses (Pet. A-8, A-16). The only bank accounts found contained small deposits in his wife's name, in trust for his children, and the only safety deposit box he had was in the name of one Nancy Segreto (Pet. A-45). Petitioner's wife was never employed, and on several

occasions petitioner gave false information as to his own employment (Pet. A-32, A-43, A-47 to A-48). The only record of petitioner's earnings showed receipt from a ship scaling company of $293.10 in 1944 and $632.19 in 1945 (Pet. A-32). In the government's computations, $500 in 1943 and $250 in 1944 were allowed as gifts from relatives to petitioner's wife, although the donors testified that their contributions were nominal (Pet. A-26). During the 1943-1955 period, petitioner frequently made purchases on credit and was often delinquent in payments (Pet. A-33 to A-34). For example, on eighteen occasions he applied to reinstate insurance policies after failing to pay on time premiums varying from $17.55 to $28.88 (G.B. 20-22). The trial court particularly noted petitioner's "general and pervasive lack of cash approaching at times impecuniosity and utter poverty * * *" (Pet. A-31).

Petitioner focuses on a single item—the total expenditures of $48,000 or more during the thirteen pre-prosecution years—to support his contention that he had a cash hoard of at least $78,000 on January 1, 1956. The illogic of petitioner's position is palpable. While the pre-prosecution expenditures suggest that petitioner had some income during the years in question, they in no way indicate the existence of a cash hoard at the start of the prosecution years—much less a hoard large enough to account for petitioner's 1956-1960 expenditures. It is not uncommon in net-worth cases for there to be a finding of little or no opening cash on hand even though there is proof of unreported income from indeterminate sources in pre-

prosecution years. See, *e.g.*, *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2), vacated and remanded as moot, 355 U.S. 38; *Beard* v. *United States*, 222 F. 2d 84 (C.A. 4), certiorari denied, 350 U.S. 846; *United States* v. *Mackey*, 345 F. 2d 499 (C.A. 7), certiorari denied, 382 U.S. 824; *United States* v. *Holovachka*, 314 F. 2d 345 (C.A. 7), certiorari denied, 374 U.S. 809; *Fowler* v. *United States*, 352 F. 2d 100 (C.A. 8), certiorari denied, 383 U.S. 907. As the court below properly found, "the totality of circumstances shown by the evidence in the case * * * support[s] the conclusion that no such cash hoard ever existed" (Pet. A-10).

b. Petitioner's other attacks on the sufficiency of the government's proof are also insubstantial. As the court of appeals noted (Pet. A-10 to A-11), the government's showing of a "likely source" of income was uncontradicted and was, in any event, unnecessary since "the Government negatived all other reasonably possible sources from which [petitioner] could have acquired non-taxable funds." See *United States* v. *Massei*, 355 U.S. 595; see also *Warring* v. *United States*, 222 F. 2d 906 (C.A. 4), certiorari denied, 350 U.S. 861. The evidence of wilfulness, as the court below observed (Pet. A-11), was clearly sufficient. And the trial court's allocation of taxable income to the year in which expenditures and net worth increases occurred (Pet. A-18 to A-19) was fully in accord with the recognized "equation of unexplained increases in net worth with unreported taxable income." *Holland* v. *United States*, 348 U.S. 121, 127.

2. There is no merit in petitioner's contention that the trial court abused its discretion in allowing the government to impeach one of its witnesses, on a showing of hostility and surprise. See *Mitchell* v. *United States*, 208 F. 2d 854, 857 (C.A. 8). The government was allowed to show that, shortly before trial, the witness had said it was "during the 1950's" that petitioner told her he had an interest in a particular restaurant rather than, as she attempted to maintain on direct examination, twenty-one to twenty-five years previously. The trial court's opinion (Pet. A-51 to A-53) shows that the impeaching evidence was given the proper limited effect and that the court, even prior to receiving that evidence, had concluded that the witness was not entitled to belief on her chronology.

3. Petitioner's constitutional arguments (Pet. 34, 39-40) are frivolous. Petitioner's rights were not violated by the use at trial of his non-incriminatory statement to prison officials in 1943 that he then had cash assets of $1,350. See *Smith* v. *United States*, 236 F. 2d 260, 265 (C.A. 8), certiorari denied, 352 U.S. 909 (no error in net worth case to base starting point on parole application documents executed by taxpayer while in prison). Were petitioner's theory correct, the government could never use lawfully obtained, non-incriminatory data in future prosecutions (here more than twenty years later). This would mean, for example, that no State could use its registry of motor vehicle serial numbers to locate the owner of a car believed to have been involved in a crime. Surely, the Constitution does not prohibit the use of such in-

formation. Nor can it reasonably be contended that 26 U.S.C. 7201 [4] is void for vagueness. The elements of the offense—wilfullness, tax deficiency and an affirmative act—have been clearly understood for many years. See *Sansone* v. *United States*, 380 U.S. 343, 351. The standard of guilt is adequately defined. *United States* v. *Skidmore*, 123 F. 2d 604, 607 (C.A. 7), certiorari denied, 315 U.S. 800.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

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SEPTEMBER 1966.

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[4] "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

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